Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

NATHANIEL L. ORTIZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an indictment charges a defendant with engaging in a conspiracy of a certain period of time, must the Government prove that the conspiracy lasted reasonably near that entire period, or may it prove simply that the conspiracy lasted for a small subset of that period?

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The opinion of the United States Court of Appeals for the Second Circuit affirming the district court's judgment of conviction may be found at 2010 WL 3736627 (Sept. 23, 2010). App., *infra*, at 1a.

The United States Court of Appeals for the Second Circuit's order denying a petition for panel rehearing and a hearing *en banc*, November 12, 2010, is unreported. App., *infra*, at 7a.

The district court's opinion upholding the judgment of conviction and denying a motion for new trial is reported at *United States v. Ortiz*, 666 F.Supp.2d 399 (S.D.N.Y. 2009). App., *infra*, at 8a.

JURISDICTION

The Second Circuit's opinion was issued on September 23, 2010, and the Circuit issued an order denying a timely petition for rehearing on November 12, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

After a jury deadlocked on drug conspiracy and weapons charges against Petitioner and a mistrial was declared, the Government augmented its case by filing a superseding indictment that charged a significantly longer conspiracy period. Evidence that had been excluded from the first trial as unduly prejudicial was admitted at the second trial as charged conduct. The second jury convicted Petitioner, and the district court sentenced him to life in prison without possibility of parole. The Second Circuit's decision below affirmed the

judgment of conviction with a holding that directly conflicts with decisions of other circuits; it thus necessitates this Court's review. Specifically, the decision below held, in accord with the Seventh and Ninth Circuits but in conflict with the Fourth and Tenth Circuits, that a conspiracy conviction requires proof merely of a part of a lengthy period charged in an indictment.

1. Petitioner was originally arrested and indicted for one count of conspiracy to distribute cocaine base from 2007 to June 2008 in violation of 21 U.S.C. §§ 812 and 841(a), and one count of illegal possession of a firearm under 18 U.S.C. § 924(c). The first trial took place in April 2009. The indictment then at issue (the "S3 Indictment") charged Mr. Ortiz with conspiring to distribute crack cocaine in violation of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A), and with possessing and using firearms in furtherance of the conspiracy in violation of 18 U.S.C. § 924(c). The conspiracy, as originally charged, allegedly lasted a maximum of eighteen months—beginning in 2007 and ending in June 2008.

Prior to the first trial, the district court excluded evidence of the 2004 arrest and conviction of co-defendant Jose Reyes. The district court excluded the 2004 conviction because it transpired years before the charged 2007-2008 conspiracy had even begun. Evidence of the 2004 conviction was therefore not probative of a 2007-2008 conspiracy, and its admission at trial would create a risk of variance, spillover, and juror confusion. As a result, the jury in the first trial heard no evidence relating to alleged pre-2007 wrongdoing.

The first jury deadlocked on all counts—as to Mr. Ortiz as well as his codefendant, Mr. Reyes—and the district court declared a mistrial.

2. Unable to obtain a conviction on a 2007-2008 conspiracy, the Government altered its theory. Just 22 days before the second trial was scheduled to commence, the Government obtained a superseding indictment that greatly expanded the duration of the charged conspiracy. Whereas the S3 indictment charged an eighteen month conspiracy, running from 2007 to June 2008, the superseding indictment charged a *4.5 year* conspiracy, running from 2004 through June 2008.

At trial, the Government attempted to establish facts purportedly evidencing a conspiracy prior to 2007. The only direct pre-2007 evidence regarding the conspiracy was hearsay testimony by Jonathan Santiago, a cooperating government witness who testified that someone named Javier told him, in a single incident in 2003, that Javier got cocaine from Ortiz.[1] Indeed, the Government itself acknowledged the "dry period in terms of evidence" of 2005-2006 in its closing argument. (Trial Tr. 1039:14-16, June 4, 2009.)

Following closing arguments, the district court submitted the case to the jury. The court instructed the jury on multiple conspiracies, and it also instructed the jurors that to convict they needed only to find evidence establishing a conspiracy at any

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[1] The Government's other new evidence—used car purchases and sales by Ortiz's girlfriend and evidence of a supposed drug transaction involving Mr. Ortiz in 2007—was not probative of the existence of the charged conspiracy prior to 2007.

time "around *or within*" the period charged in the indictment.[2] Mr. Ortiz objected to this instruction.

Under the district court's "around or within" instruction, the jury could have convicted even if it found that a conspiracy existed in just a small fraction of the 4.5 years alleged in the indictment. Defendants objected to this instruction and requested a clarifying instruction. The court expressed "concern" about this issue and expressed an inclination to deliver such a clarification:

> [THE COURT:] Here is my concern and why I am inclined to say something. * * * I am concerned about the presence of the word "within." This was not an issue in the first trial; it is now an issue in this case, very much an issue, in light of the lawyers' arguments.
>
> Technically, if they found that the conspiracy existed for 6 months within that 5-year period that is alleged in the indictment, under this ["within"] language they could reasonably find that the conspiracy was proven. I think I would be hard-pressed to agree that 5 months out of 5 years was substantially similar. I am inclined to say something [to the jury, to clarify the standard]. . . .

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[2] "It is not essential that the Government prove that the conspiracy alleged started and ended on any specific dates. Indeed, it is sufficient if you find that the conspiracy was formed and that it existed for some time around *or within* the dates set forth in the indictment." (Trial Tr. 1144:19-23, June 4, 2009) (emphasis added).

> We did not find cases [discussing] whether . . . the [Second Circuit's] substantial similarity language is in a variance in dates charge as opposed to a time of the conspiracy charge. But I don't know why we wouldn't use it. In terms of the start date and the end date of the conspiracy concept, it seems to me it would apply. So for these reasons I am inclined to do it.

(Trial Tr. 1192:21 – 1193:21, June 5, 2009.) However, the district court later declined to deliver a clarifying instruction, instead stating that it would allow briefing on the issue, noting "several thorny issues," following a verdict. (Trial Tr. 1203:24, June 5, 2009.) The jury convicted on both counts.

On July 7, 2009, Mr. Ortiz moved for acquittal pursuant to Federal Rule of Criminal Procedure 29. Mr. Ortiz argued that the evidence proved at most a conspiracy from 2007 to June 2008 and was insufficient to prove the charged 4.5-year conspiracy. Specifically, the Government adduced meaningful evidence for at most 18 of the 54 months alleged, or merely 33% of the indicted time period. The motion further explained that the gap in timing and evidence caused a prejudicial variance between the conspiracy charged in the indictment and the evidence adduced at trial, wherein substantially less than half of the charged period was supported by meaningful evidence. This motion for acquittal was denied, and Mr. Ortiz was subsequently sentenced to life in prison.

3. Mr. Ortiz appealed to the Second Circuit, asking for a new trial. The Second Circuit denied his appeal, finding no prejudicial variance because, *inter*

alia, "[e]ven assuming that the evidence for 2004 through 2006 was insufficient, the undisputed evidence from 2007 and 2008 *fell within the time period charged in the Indictment*." App., *infra*, at 4a (emphasis added).

REASON FOR GRANTING THE PETITION

I. THERE IS A DEEP CIRCUIT SPLIT REGARDING WHETHER THE GOVERNMENT MUST PROVE THAT A CONSPIRACY LASTED FOR ALL, INSTEAD OF ONLY PART, OF THE CONSPIRACY PERIOD ALLEGED IN AN INDICTMENT

There is a deep 3-2 circuit split regarding how much of a months- or years-long conspiracy the Government must prove when charging a specific time period. The Second Circuit below, as well as the Seventh and Ninth Circuits, take a liberal approach, allowing prosecutors to prove merely a small subset of the overall time period charged in a conspiracy. Conversely, the Fourth and Tenth Circuits require prosecutors to prove that the conspiracy lasted for reasonably near the entire time span charged in the indictment. The two sides of this split are described in turn below.

A. The Second, Seventh, And Ninth Circuits Allow Prosecutors To Prove Merely A Small Amount Of The Conspiracy Time Period Charged In An Indictment

In this case, the Government charged a 4.5-year conspiracy (2004—June 2008), but its only credible

evidence concerned a conspiracy purportedly lasting at most eighteen months (2007—June 2008). The Second Circuit affirmed the district court's denial of Mr. Ortiz's motion for a new trial, finding no variance and no prejudice. The court assumed that the evidence from 2004—2006 was insufficient but explained that variance between indictment and proof is acceptable where proffered evidence falls within the time period charged, especially when time is not an element of the charged offense. *Id.*

Like the Second Circuit, the Seventh and Ninth Circuits require only that a conspiracy occur "within" the dates alleged.

In *United States v. Bustamante*, 493 F.3d 879 (7th Cir. 2007), the Seventh Circuit rejected variance and sufficiency arguments in a conspiracy case, stating that "a prosecutor may elect to proceed on a subset of the allegations in the indictment, proving a conspiracy smaller than the one alleged." *Bustamante*, 493 F.3d at 885 (quoting *United States v. Duff*, 76 F.3d 122, 126 (7th Cir. 1996)). *Accord, United States v. Toliver*, 374 Fed.Appx. 655, 658 (7th Cir. 2010) (a "rational jury could have found" that the defendant "knew about and agreed to participate in [the conspiracy] *within the dates alleged* in the indictment") (emphasis added).

The Ninth Circuit has similarly declined to require any equivalency between the conspiracy time period proved at trial and the period alleged in the indictment. In *United States v. Guzman*, 852 F.2d 1117 (9th Cir. 1988), the Ninth Circuit held that "[t]he time period of a conspiracy is determined not by the dates alleged in the indictment, but by the evidence adduced at trial." *Id.* at 1120 (citations omitted). *Accord, United States v. Smith*, 86 F.3d

1165 (Table), 1996 WL 287173, at *6 (9th Cir. 1996) ("The jury's note [indicated] a concern about whether the single conspiracy had to begin and end on the specific dates alleged in the indictment. The district court properly addressed that concern by reiterating that the government had to prove . . . the single conspiracy charged in fact existed *within* the specific dates alleged in the indictment.") (emphasis added).

B. The Fourth And Tenth Circuits Require That The Government Prove The Same Conspiracy Time Period Charged In An Indictment

In conflict with the approach of the Second, Seventh, and Ninth Circuits, the Tenth and Fourth Circuits have required the Government to prove that the conspiracy lasted for substantially near the entirety of the period charged.

In *United States v. Ailsworth*, 138 F.3d 843 (10th Cir. 1998), the indictment alleged a single broad drug conspiracy from March 1993 through March 1994, but the proof at trial showed that the evidence of a conspiracy was limited to the defendant's participation in just a single transaction on November 19, 1993. Circumstances surrounding the jury's verdict indicated that it found guilt on the charged conspiracy based only on that one transaction. *Id.* at 847, 849. The court held that "a variance exists because the evidence presented at trial proved facts different from the single widespread conspiracy alleged in the second superseding indictment." *Id.* at 849. While the court ultimately affirmed the conviction, that was only because—unlike here—the variance caused no prejudice.

In *United States v. McLean*, No. 96-4789, 1998 WL 879497 (4th Cir. 1998), the Government charged a 26-year conspiracy. The Fourth Circuit found that the U.S. failed to prove the existence of any conspiracy lasting for that period of time: "Where, as here, the lack of evidence is such that a 'reasonable factfinder' could not have found that the government established an overarching 26-year conspiracy, we must reverse the judgment of conviction and remand for entry of a judgment of acquittal." *McLean*, 1998 WL 879497, at *6. In holding that the variance violated substantial rights, the court elaborated:

> The government exceeded its bounds by charging and attempting to prove a 26-year conspiracy for which evidence was sketchy at best. . . . Charging McLean and his co-conspirators with a 26-year conspiracy, but offering little or no proof as to activities in the first 17 years of the time period covered, is not prosecutorial conduct that the court can support. Conspiracy charges are useful tools for prosecutors, *but using the charge to reach well beyond the range of activity supported by the evidence is an abuse of the weapon.*

Id., at *6-7 (emphasis added). The Fourth Circuit found that the Government had arguably proven just nine years of the 26 alleged, or 35% of the period; similarly, in this case the Government adduced meaningful, admissible evidence for at most 18 of the 54 months alleged, or merely 33% of the indicted span.

Before the Second Circuit's decision below, older Second Circuit decisions followed a similar rule. *See*

United States v. Morales, 185 F.3d 74 (2d Cir. 1999) (holding that a rational jury could not have found the existence of a racketeering conspiracy from 1987 to 1996 without evidence of wrongdoing in the middle seven years); *United States v. Russano*, 257 F.2d 712 (2d Cir. 1958) (reversing a conviction where a two-year evidentiary gap existed in the middle of a charged six-year narcotics conspiracy). Indeed, the Second Circuit's pattern jury instructions, by Judge Leonard Sand, Federal District Judge, Southern District of New York, are consistent with the approach of the Fourth and Tenth Circuits. 1-3 Modern Federal Jury Instructions-Criminal § 3.01, Instr. 3-12 (requiring "a substantial similarity between the dates alleged in the indictment and the date established by testimony or exhibits").

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT

The choice between the rule of the Fourth and Tenth Circuits and the rule of the Second, Seventh, and Ninth Circuits is dispositive here. Given the manifest confusion in the lower courts over the proper standard for proof requirements when a substantial gap in evidence exists in conspiracy charges, this issue warrants this Court's review.

If the permissive interpretation of proof requirements for the entire period of a charged conspiracy is allowed, there would be virtually no limit to the time-span the Government can charge. The Government could gain conviction by proving any subset of an expansive charged period, including by bootstrapping otherwise inadmissible evidence into the indicted timeframe.

If, however, the Government must prove that a conspiracy existed—and that a defendant was a participant—for the entirety of the indicted period, Mr. Ortiz's conviction cannot stand. The facts here allow for straightforward analysis of the circuit conflict. It is therefore an ideal vehicle to resolve the circuit split.

III. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

This case highlights why the issue in question is vital for the effective administration of federal criminal justice. The Government's attempt here to bootstrap evidence that was excluded from a previous trial was successful only because the Government was permitted to charge a conspiracy period far beyond that for which it had evidence sufficient to meet the standard of beyond a reasonable doubt.

The Fifth Amendment grand jury requirement is gutted if the Government can obtain a conviction, as it did here, without proving that a crime occurred for the time period—or reasonably near the time period, without years-long gaps—charged. As the *McLean* court noted: "Conspiracy charges are useful tools for prosecutors, but using the charge to reach well beyond the range of activity supported by the evidence is an abuse of the weapon." *McLean*, 1998 WL 879497, at *7. Allowing the Government free rein regarding indictment periods—and the proof required within them for conviction—in some circuits but not in others is a critical issue for consistency and fairness in U.S. criminal law.

Allowing the liberal approach endorsed by the Second, Seventh, and Ninth Circuits invites the kind

of abusive tactics that occurred here. The evidentiary gap at issue in this case was foreseeable; at oral argument prior to trial, counsel for the Defendants asserted that the purpose and effect of the expanded indictment was to bootstrap inadmissible evidence into trial.

This case involved obvious governmental overreach and prejudice to the defendant. The very reason for the Government's superseding indictment charging a longer conspiracy than it could prove was the fact that the first jury hung when a shorter conspiracy was charged. As such, the Government's tactic, much like what occurred in *McLean*, created prejudicial spillover from 2004 to 2007-08. The Second Circuit decision below, allowing such overreach, establishes a deep conflict with other circuits on a vital issue for criminal justice, making necessary this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

United States Court of Appeals,
Second Circuit.

Docket No. 09-4806-cr.

UNITED STATES of America,

Appellee,

v.

Nathaniel L. ORTIZ,

Defendant-Appellant.

Decided: Sept. 23, 2010.

Before: MINER, LEVAL, and WESLEY, Circuit Judges.

SUMMARY ORDER:

Plaintiff-appellant, Nathaniel L. Ortiz ("Appellant"), appeals from a judgment of the United States District Court for the Southern District of New York (Chin, J.), entered on November 12, 2009, convicting Appellant of conspiracy to distribute fifty grams or more of crack cocaine, in violation of 21 U.S.C. § 846 and brandishing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii), 2. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

Appellant advances four arguments on appeal. First, he argues that the evidence was insufficient to prove the charged conspiracy for three of the four and a half years charged in the Superseding Indictment (the "Indictment"). Second, he argues that there was a substantial variance between the dates of the conspiracy alleged in the Indictment and the proof adduced at trial. Third, he argues that the district court erred in admitting into evidence certain hearsay statements. Finally, he argues that his sentence is substantively unreasonable.

We conclude that the evidence is sufficient to show the existence of a drug conspiracy lasting from 2004 until 2008 and to link Appellant to the conspiracy for its full duration.[1] A defendant challenging the sufficiency of the evidence bears a "heavy burden," because this Court "must consider the evidence in the light most favorable to the prosecution and uphold the conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Agüilar*, 585 F.3d 652, 656 (2d Cir. 2009) (internal quotation marks omitted)(emphasis in original). Where a defendant challenges the sufficiency of the evidence in a conspiracy, "deference to the jury's findings is especially important . . . because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with . . . precision." *United States v. Santos*, 541 F.3d 63, 70 (2d Cir.2008) (internal quotation marks

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[1] We review a challenge to the sufficiency of the evidence de novo. *United States v. Yannotti*, 541 F.3d 112, 120-21 (2d Cir.2008).

omitted). "Both the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence." *See United States v. Ste-wart*, 485 F.3d 666, 671 (2d Cir.2007).

Appellant does not dispute the substantial and direct evidence proving his leadership of the drug distribution conspiracy throughout 2007 and 2008. Though less substantial, there is nonetheless an array of circumstantial evidence of the conspiracy's existence and Appellant's involvement for 2004 through 2006. That evidence includes, inter alia: (1) 2004 undercover purchases of crack cocaine in Appellant's signature black dime bags occurring at 1269 Grand Concourse; (2) the unreported income of Appellant and his now wife allowing her to purchase a number of luxury automobiles; (3) testimony regarding a witness' personal knowledge of ongoing crack sales at 1269 Grand Concourse during 2004; and (4) testimony regarding ongoing crack sales on behalf of Appellant at the same location from at least 2006. This evidence, considered in its totality, is sufficient for a rational jury to infer Appellant's continued participation, dating back to 2004, in the same drug distribution conspiracy shown to exist in 2007 and 2008.

In any event, reversal of the conviction is not appropriate because Appellant cannot show an impermissible variance between the Indictment and the proof, nor can he show requisite prejudice. A variance occurs "when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment." *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir.2006) (internal quotation marks omitted).

Reversal of the conviction is warranted only if the alleged variance prejudiced the defendant. *Id.* Prejudice exists if the variance "infringes on the substantial rights that indictments exist to protect-to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy." *Id.*

"[A]n indictment date only needs to be substantially similar to the date established at trial." *United States v. Teague*, 93 F.3d 81, 84 (2d Cir.1996). "[S]ignificant flexibility in proof," is permissible "provided that the defendant was given notice of the core of criminality to be proven at trial." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir.1983). Furthermore, "[p]articularly with respect to allegations of time, we have permitted proof to vary from the indictment provided that the proof fell within the period charged." *Id.* This is especially true where, as here, time is not an element of the charged offense. *See id.* at 669.

Even assuming that the evidence for 2004 through 2006 was insufficient, the undisputed evidence from 2007 and 2008 fell within the time period charged in the Indictment. Further, the 2007-2008 evidence did not prove criminal activities that were materially different than those in 2004-2006. Thus, Appellant was at all times on notice of the "core criminality" to be proven at trial. *See Heimann*, 705 F.2d at 666, 669.

For similar reasons Appellant cannot show prejudice. He was on notice of the exact crimes charged and could mount a proper defense, and the government cannot retry him for the same 2004-2008

conspiracy. *See Dupre*, 462 F.3d at 140. Absent prejudice, reversal of the conviction is not merited.

In light of the discussion above, we need not determine whether the district court abused its discretion in admitting certain hearsay statements from an unavailable witness. Such an error would be harmless in light of the overwhelming evidence for 2007 and 2008 and our conclusion that no prejudicial variance exists. *See United States v. Padilla*, 548 F.3d 179, 190 (2d Cir.2008).

Finally, we conclude that Appellant's life sentence is not substantively unreasonable. We will not "substitute our own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir.2008). We will "set aside a district court's *substantive* determination only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." *Id.* (emphasis in original) (internal quotations omitted).

At Appellant's sentencing hearing, the district court considered a number of factors including the quantity of drugs involved; Appellant's leadership role in the organization; his multiple prior convictions including one for attempted murder; and his employment of youths in the criminal conspiracy. In light of these factors, the district court adopted the life sentence recommended in the Presentence Report. Nothing in the record suggests that the district court abused its discretion, and we conclude that the sentence is substantively reasonable.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of November, two thousand and ten.

UNITED STATES OF AMERICA,

Appellee,

-v.-

Docket Number: 09-4806-cr

NATHANIEL L. ORTIZ,

Defendant-Appellant.

Nathaniel Ortiz having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT
Catherine O' Hagan Wolfe, Clerk

APPENDIX C

Docket No. S15 08 Cr. 548(DC).

United States District Court,
S.D. New York.

UNITED STATES of America,

v.

Nathaniel L. ORTIZ, a/k/a "Nate," and Jose Reyes,

Defendants.

Decided: Oct. 23, 2009.

MEMORANDUM DECISION

CHIN, District Judge.

On June 5, 2009, a jury convicted defendant Nathaniel L. Ortiz of conspiracy to distribute or possess with intent to distribute crack cocaine and possession of a firearm in furtherance of the conspiracy. Ortiz moves, pursuant to Federal Rule of Criminal Procedure 29, for a judgment of acquittal and dismissal of the superseding indictment (the "Indictment"). Ortiz advances three arguments in support of the motion. First, he argues that the evidence was insufficient to prove the charged conspiracy because of the lack of evidence as to three of the years in question. Second, he argues that there was a substantial variance between the dates of the conspiracy alleged in the Indictment and the proof adduced at trial. Third, he argues that the Indictment

should be dismissed because insufficient evidence was presented to the grand jury.

At oral argument, Ortiz's co-defendant, Jose Reyes, joined the motion "to the extent that [his] position is not inconsistent with [Ortiz's]." (Oral Arg. Tr. at 5). No papers were filed on Reyes's behalf.

For the reasons set forth below, the motion is denied as to both Ortiz and Reyes.

DISCUSSION

The Indictment charged Ortiz and Reyes with a conspiracy that continued "[f]rom at least in or about 2004, up to and including in or about June 2008." Ortiz's Rule 29 motion is predicated primarily on what he regards as the Government's failure to adduce sufficient evidence of a conspiracy in 2004, 2005, and 2006.[2]

A. *Standard on a Rule 29 Motion*

A defendant moving for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure based on the sufficiency of the evidence "faces a heavy burden." *United States v. Glenn*, 312 F.3d 58, 63 (2d Cir.2002) (internal quotations omitted). The court must uphold a jury's guilty verdict if, after viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, the court concludes that " '*any* rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Medina*, 944 F.2d 60, 66 (2d Cir.1991) (quoting

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[2] Ortiz, of course, disputes that a conspiracy existed from 2007 to 2008 as well, but that is not a basis of this motion.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Therefore, a jury's verdict will be affirmed "so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt." *United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir.2003).

A conviction, however, cannot be based on "speculation and surmise alone." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir.1994). Thus, the Government "must do more than introduce evidence 'at least as consistent with innocence as with guilt.' " *Id.* (quoting *United States v. Mulheren*, 938 F.2d 364, 372 (2d Cir.1991)).

B. *There Was Sufficient Evidence for the Years 2004, 2005, and 2006*

Ortiz argues that the Court must enter a judgment of acquittal because there was no evidence that a conspiracy existed in 2005 and 2006, and there was "no reliable evidence" tying Ortiz to the conspiracy in 2004. He is incorrect on the law and the facts.

To prove a defendant guilty of conspiracy, the Government must prove that a conspiracy existed and that the defendant knowingly participated at some point-not that he was active at all times during the duration of the conspiracy's life. "There is no requirement that the same people be involved throughout the duration of the conspiracy." *United States v. Vanwort*, 887 F.2d 375, 383 (2d Cir.1989). Here, the Government produced evidence both that the charged conspiracy existed from 2004 through 2008 and that Ortiz was a member of the conspiracy during its entire span. As the Government points out, it adduced at

trial, *inter alia*, the following evidence as to the years before 2004 and continuing through 2006:

Jonathan Santiago testified that in 2003, someone named "Javier" sold crack at 1269 Grand Con-course, and that "Javier" worked for Ortiz. (Trial Tr. at 108-15).

Jose Reyes was convicted in 2004 for a sale of crack at 1269 Grand Concourse with an individual identified as the same "Javier" who, according to Santiago, sold crack for Ortiz. (Trial Tr. at 300).

The crack sold by Reyes and Javier in 2004 was sold in the same black dime bags that Ortiz's crew used in 2007 and 2008-black dime bags that Officer Odalas Perez described as "very, very rare." (Government Exhibits 44A and 45A; Trial Tr. at 279).

Santiago testified that Ortiz was "dealing" at 1269 Grand Concourse when Santiago was 14 years old-which would have been in 2004 or 2005. (Trial Tr. at 127).

In late 2003, Lucecita Varela, Ortiz's wife, purchased a car for $12,491. She paid for the car in cash, and all the bills used were in a denomination under $100. (Gov. Exs. 103 & 103A).

In 2005, Varela purchased two additional cars. (Gov. Ex. 103).

William Velasquez testified that he witnessed what he believed to be drug sales at 1269 Grand Concourse in 2005 and 2006, and that one of the sellers he saw was someone that Velasquez knew worked for Ortiz. (Trial Tr. at 760, 740).

In 2006, Varela purchased five additional vehicles, including a BMW, a Mercedes-Benz, an Infiniti, and a Chrysler Town & Country van. She paid for at least one of the vehicles in cash, with all the bills in a denomination under $100. Jose Taveras testified that Ortiz drove a BMW, a Mercedes-Benz, an Infiniti, and a Chrysler Town & Country van. (Gov. Ex. 103; Trial Tr. 355, 359-60).

During the years that Varela purchased these cars, she did not report to the IRS any significant income. (Gov. Ex. 103B).[3]

Ortiz vigorously contests all of this evidence, arguing that it proves nothing, is unreliable, is circumstantial,[4] and/or is contradicted by other evidence in the record. These are all arguments that Ortiz's able counsel made to the jury, and evidently the jury rejected them. It is not this Court's role to second-guess the inferences the jury drew, the weight it gave to the evidence, or its resolution of conflicts in the evidence.

As for defendant Reyes, the Government also met its burden with regard to his participation in the same conspiracy. They adduced evidence that he was

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[3] There was substantial evidence as to the conspiracy's activities and defendants' activities in 2007 and 2008.

[4] To the extent that Ortiz suggests the Government cannot prove its case through circumstantial evidence, he is incorrect. *See* *United States v. Stewart*, 485 F.3d 666, 671 (2d Cir.2007) ("Both the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence.").

convicted for selling crack cocaine as part of Ortiz's crew in 2004, and that he was back selling with Ortiz's crew again in 2007, after he got out of jail. (Trial Tr. at 930).

C. *Even If There Was a Variance, It Was Not Prejudicial*

Ortiz argues that the Court must enter a judgment of acquittal because the supposed lack of evidence of the existence of the conspiracy from 2004 to 2006 constitutes a prejudicial variance. I disagree.

1. *Applicable Law*

A variance occurs when the evidence adduced at trial proves facts "materially different" than the facts alleged in an indictment. *United States v. Zingaro*, 858 F.2d 94, 98 (2d Cir.1988). In most instances a variance will not require granting a judgment of acquittal, because the Second Circuit employs a fairly "relaxed" standard regarding "the effect of time allegations." *United States v. Heimann*, 705 F.2d 662, 666 (2d Cir.1983). The Second Circuit has "permitted significant flexibility in proof, provided that the defendant was given notice of the 'core of criminality' to be proven at trial." *Id.* (quoting *United States v. Sindona*, 636 F.2d 792, 797-98 (2d Cir.1980)). A variance only warrants entry of a judgment of acquittal when it results in "substantial prejudice" to the defendant. *See United States v. Rigas*, 490 F.3d 208, 226 (2d Cir.2007); *United States v. McDermott*, 918 F.2d 319, 326 (2d Cir.1990). To determine whether a variance is prejudicial, the court must decide "whether the variance infringes on the 'substantial rights' that indictments exist to protect-'to inform an accused of the charges against him so that he may prepare his defense and to avoid double jeopardy.'" *United States v.*

Dupre, 462 F.3d 131, 141 (2d Cir.2006) (quoting *United States v. D'Anna*, 450 F.2d 1201, 1204 (2d Cir.1971)).

In the Second Circuit, in general, "an indictment date only needs to be substantially similar to the date established at trial." *United States v. Teague*, 93 F.3d 81, 84 (2d Cir.1996) (internal citations and quotations omitted); *United States v. Morgenstern*, 933 F.2d 1108, 1115 (2d Cir.1991) (holding that "the district court correctly instructed the jury that there had to be a substantial similarity between the indictment and the proof in order to find the defendant guilty") (internal citations and quotations omitted); *United States v. Valencia*, 226 F.Supp.2d 503, 508 n. 3 (S.D.N.Y.2002) (Chin, J.), *aff'd*, 100 Fed.Appx. 17 (2d Cir.2004) (conviction upheld where evidence at trial showed narcotics activity only for five days out of the nineteen months charged in the indictment); 1-3 Sand Modern Federal Jury Instructions-Criminal § 3.01, Instr. 3-12 (recommending substantial similarity test). *But see United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir.1987) ("Where 'on or about' language is used, the government is not required to prove the exact date, if a date *reasonably near* is established.") (citations omitted) (emphasis added).

In general, where the dates of a conspiracy proven at trial are within the dates charged in the indictment, courts conclude that the variance is not prejudicial. *See Heimann*, 705 F.2d at 666 ("Particularly with respect to allegations of time, we have permitted proof to vary from the indictment provided that the proof fell within the period charged."); *United States v. Wilson*, 134 F.3d 855, 865 (7th Cir.1998) ("If the conspiracy charged in the indictment includes the smaller conspiracy found by

the jury, then the variance will not be fatal, since the indictment would have sufficiently notified the defendants of the Government's accusations."); *United States v. Queen*, 132 F.3d 991, 999 (4th Cir.1997) (noting, in dicta, that "the trier of fact may find that the starting date of a conspiracy begins anytime in the time window alleged, so long as the time frame alleged places the defendant sufficiently on notice of the acts with which he is charged"). There are, however, exceptions. *See, e.g., United States v. Morales*, 185 F.3d 74, 80 (2d Cir.1999) (reversing RICO conviction where conspirators were incarcerated for seven years of nine-year charged conspiracy).

2. *Application*

As discussed above, there was sufficient circumstantial evidence in the record from which a reasonable jury could have concluded that a conspiracy existed from 2004 through 2006 (and continuing to 2008) and that Ortiz was a member of the conspiracy for the entire span. Therefore, no variance existed. The proof at trial substantially matched the allegations of the Indictment.

Even assuming there was a variance, however, it would not warrant a judgment of acquittal, because the purported variance was not prejudicial. First, all the evidence of a conspiracy adduced at trial fell within the general period charged in the Indictment. The Second Circuit generally regards variances within the charged period as non-prejudicial. *See Heimann*, 705 F.2d at 666. Variances within the charged period are non-prejudicial because they do not infringe on the "substantial rights" that indictments protect-namely, informing the accused of the charges against him and avoiding double jeopardy. Dupre, 462 F.3d at 141.

Variances that bring in evidence substantially outside of the charged period, on the other hand, pose the risk that the defendant will not be on notice of the nature of the charges against him, and that he will be at risk of double jeopardy if he is subsequently charged in conjunction with those earlier or later acts.

Here, there can be no question that Ortiz's rights were safeguarded. Ortiz knew precisely the nature of the charges against him and the evidence the Government would use to support those charges, and there is no doubt that the Government could not retry Ortiz again for the same 2004-2008 conspiracy.

Ortiz argues that the Government only decided to expand the time frame of the charged conspiracy between the first trial and the second trial as a maneuver to make admissible certain prejudicial evidence from the earlier years. This argument is rejected. First, as noted above, there *was* a basis for expanding the period of the conspiracy because there was proof that the conspiracy existed during the entire period from 2004 until 2008. Second, I find that the Government did not act in bad faith in any event. Accordingly, there is no prejudicial variance.

Morales does not, as the co-defendants argue, compel a different result. The facts of that case are different from the facts presented here. In *Morales*, the defendants were charged with a RICO conspiracy beginning in 1987 and lasting until 1996. 185 F.3d at 80. In 1988, however, all the defendants either died or went to prison, and those who went to prison were not released until 1995. *Id.* The Second Circuit reversed the conviction on sufficiency of the evidence grounds, holding that because of the "length of incarceration and

the dearth of evidence of activity between 1988 and 1995, no rational jury could have found beyond a reasonable doubt the existence of an enterprise lasting from 1987 to 1996." *Id.* at 81. Here, there is not, as discussed above, a "dearth of evidence of activity" from 2004 to 2006. Rather, adequate circumstantial evidence was adduced at trial for every year of the charged conspiracy. Moreover, unlike the defendants in *Morales,* Ortiz was not charged with a RICO conspiracy, so there was no need for the government to prove the existence of a "continuing criminal enterprise." Proof of the existence of an "enterprise" during the seven years of the defendants' incarceration was central to the outcome in *Morales.* Thus, *Morales* is distinguishable.[5]

For these reasons, I conclude that there was no variance, as there is evidence in the record to support the jury's verdict that a conspiracy existed for each of the years charged in the Indictment. Even if there was a variance, though, it was not prejudicial. The same analysis applies to Reyes.

D. *The Alleged Defects Before the Grand Jury Do Not Warrant Dismissal of the Indictment*

Ortiz argues that the Indictment should be dismissed because it is "the product of testimony and evidence that was incorrect and wholly insufficient to

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[5] *United States v. Russano,* on which Ortiz also relies, is also distinguishable. In *Russano,* the conspiracy charged was from 1951 until 1957, but no evidence was adduced at trial for the years 1952 to 1955. 257 F.2d 712, 713 (2d Cir.1958). As noted above, it is not the case here that there is *no* evidence for any of the years charged in the Indictment.

produce a valid bill of charges." (Ortiz Mem. at 17). Specifically, Ortiz takes issue with Special Agent Kolvek's grand jury testimony in which she testified that Ortiz had been involved in two pre-2007 "hand-to-hand sale arrests." (Nesser Decl. Ex. A at 14-15). As the Government later conceded, one of these arrests did not involve crack cocaine, and the Court struck the other arrest from admission at trial because the evidence tying Ortiz to the sale was so weak. Ortiz now moves for dismissal of the Indictment based on Special Agent Kolvek's "incorrect and conclusory testimony." The motion is denied.

Even assuming the testimony was inaccurate, "[i]t is well settled that a guilty verdict at trial 'remedies any possible defects in the grand jury indictment.'" *United States v. Lombardozzi*, 491 F.3d 61, 80 (2d Cir.2007) (quoting *United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir.1996)); *United States v. Mechanik*, 475 U.S. 66, 73, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) (holding that "the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings"). Ortiz responds to this line of cases by arguing that the jury could not have cured the defect, because the defect was insufficient evidence of a conspiracy in 2004, 2005, and 2006. The Court cannot, however, dismiss a facially valid indictment based on insufficient evidence.[6] *See United States v. Calandra*, 414 U.S. 338, 345, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (holding that "an indictment valid on its face is not subject to challenge

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[6] Ortiz does not argue that the Indictment was facially defective.

on the ground that the grand jury acted on the basis of inadequate or incompetent evidence"); *United States v. Casamento*, 887 F.2d 1141, 1183 (2d Cir.1989) (holding that facially valid indictment "may not be challenged on the ground that it is based on inadequate evidence"); *United States v. Butler*, 351 F.Supp.2d 121, 126 (S.D.N.Y.2004) (Lynch, J.) ("[I]t is hornbook law that a federal defendant may not challenge a facially-valid indictment . . . on the ground that it is based on insufficient evidence."). Accordingly, Ortiz's motion to dismiss the Indictment is denied.

CONCLUSION

For the foregoing reasons, the motion is denied in its entirety.